

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

|                                       |   |                    |
|---------------------------------------|---|--------------------|
| <b>HELEN KRAEMER</b>                  | ) |                    |
| Claimant                              | ) |                    |
|                                       | ) |                    |
| VS.                                   | ) |                    |
|                                       | ) |                    |
| <b>U.S.D. #383</b>                    | ) |                    |
| Respondent                            | ) | Docket No. 259,431 |
|                                       | ) |                    |
| AND                                   | ) |                    |
|                                       | ) |                    |
| <b>KANSAS ASSOC. OF SCHOOL BOARDS</b> | ) |                    |
| Insurance Carrier                     | ) |                    |

**ORDER**

Respondent and its insurance carrier request review of the March 21, 2005 Award by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on August 9, 2005.

**APPEARANCES**

Gary M. Peterson of Topeka, Kansas, appeared for the claimant. Anton C. Andersen of Kansas City, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

It was undisputed that claimant suffered a series of repetitive injuries which required numerous back surgeries. As a result of her work related injuries, the Administrative Law Judge (ALJ) found the claimant sustained a permanent total disability.

The respondent requests review of nature and extent of disability. Respondent argues the claimant is not permanently and totally disabled. Respondent further argues

the testimony of its medical expert, Dr. Eden Wheeler, and its vocational expert, Gary Weimholt, as well as the surveillance video of the claimant establish she is not as incapacitated as alleged. Consequently, respondent concludes claimant is only entitled to an award of permanent partial disability.

Conversely, claimant argues the preponderance of the medical evidence establishes that she suffers from failed back syndrome with chronic back pain which prevents her from engaging in employment. Consequently, claimant further argues the ALJ's Award should be affirmed. But claimant contends she should be entitled to ongoing treatment consisting of pain medication to treat her chronic pain.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds the ALJ's findings of fact are accurate and supported by the facts contained in the record. It is not necessary to repeat those findings in this Order. The Board adopts those findings as its own to the extent that they are not inconsistent with the findings and conclusions expressed herein.

The sole issue raised on review by respondent is whether claimant met her burden of proof to establish that she is permanently and totally disabled.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>1</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>2</sup>

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.<sup>3</sup>

K.S.A. 44-510c(a)(2) (Furse 1993) defines permanent total disability as follows:

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<sup>1</sup> K.S.A. 44-501(a) (Furse 1993).

<sup>2</sup> K.S.A. 1995 Supp. 44-508(g).

<sup>3</sup> *Tovar v. IBP, Inc.*, 15 Kan. App.2d 782, 817 P.2d 212 (1991).

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2) (Furse 1993), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.<sup>4</sup>

In *Wardlow*<sup>5</sup>, the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

In this instance the claimant has undergone numerous back surgeries and has been diagnosed with a failed back syndrome. The doctors and vocational experts all concluded that claimant would be unable to engage in full-time employment if she is required to frequently change positions to alleviate her chronic pain. The ALJ summarized the evidence in the following fashion:

The Claimant has undergone five lumbar surgeries-three laminectomy/discectomies and two fusions-and the implantation and removal of a spinal cord stimulator.<sup>6</sup> She continues to receive pain medication from Dr. Charapata through her health insurance. Dr. Charapata testified the Claimant suffers from a failed back syndrome, and he does not believe she will ever return to any gainful employment.

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<sup>4</sup> *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

<sup>5</sup> *Wardlow v. ANR Freight Systems, Inc.*, 19 Kan. App. 2d 110, 113 (1993).

<sup>6</sup> Claimant testified she sought unauthorized treatment in Nashville, Tennessee, and has had a total of nine back surgeries.

Dr. Wheeler examined the Claimant on January 6, 2005 at the request of the Respondent. He testified the Claimant has a DRE Category V 25% impairment. He testified that if the Claimant found employment it would require she be allowed to frequently change positions from sitting to standing and back, but realistically she was unemployable. His opinion was based primarily upon the Claimant's report of symptoms.

Dr. Koprivica saw the Claimant in November 2003 at the request of her attorney. He testified the Claimant suffers from a failed back syndrome, and she has a DRE Category VI 40% impairment, or a 34% impairment if the 3d edition of the AMA Guides was used. He opined the Claimant was unemployable as an employer would have to allow the Claimant to change position frequently, and her ability to tolerate work would be short. Like Dr. Wheeler his opinion was based primarily upon the symptoms the Claimant reported to him.

The two vocational experts agreed the Claimant would be precluded from full time employment because of the need for frequent postural changes suggested by the physicians.<sup>7</sup>

The claimant testified she has good days and bad days but that if she engages in consistent physical activities she is then incapacitated for several days. Dr. Charapata corroborated claimant's testimony and noted that claimant tries physical activities but then ends up in a pain crisis and requires treatment such as epidural injections.<sup>8</sup>

The Board is mindful that the doctors' opinions relied upon claimant's description of her pain and the onset of pain with physical activities. Accordingly, the videotape of claimant, which the respondent introduced, was carefully reviewed. The respondent argues the videotape demonstrated claimant could engage in more physical activities than she testified she was able to perform. The Board disagrees. The limited minutes of videotape demonstrates the claimant can drive and shop but more significant is the fact that after actually videotaping claimant on one day, the investigator was unable to observe claimant on the following day or a few days later. This would tend to corroborate claimant's testimony that after attempting physical activities she frequently is then incapacitated.

Moreover, the respondent's medical expert, Dr. Wheeler, did not doubt the claimant's credibility when she indicated her pain was worsened with activity and Dr. Wheeler did not believe claimant was magnifying her symptoms. Dr. Wheeler agreed that claimant's pain, the requirement she take pain medication and alternate sitting and standing could preclude full-time employment. And Mr. Weimholt agreed the doctors' restrictions of frequent postural changes, including the necessity to lie down on occasion, would prevent claimant from full-time employment.

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<sup>7</sup> ALJ Award (March 21, 2005) at 3.

<sup>8</sup> Charapatta Depo. at 13.

Based upon the totality of the evidence including the numerous surgeries, the findings of Drs. Koprivica and Charapatta, the opinion of Mr. Longacre, the limited physical activities the claimant can perform, and her testimony that activity worsens her pain, it is the Board's determination the claimant has met her burden of proof to establish that she is essentially and realistically unemployable. The ALJ's determination that claimant is permanently and totally disabled is affirmed in all respects.

Likewise, the Board affirms the ALJ's determination that claimant is entitled to future medical upon proper application. The respondent provided claimant significant medical treatment including numerous back surgeries. Claimant also sought unauthorized medical treatment which apparently included additional back surgeries. It is unclear from the record exactly when or why claimant proceeded with those surgeries without requesting that respondent provide the treatment. And it appears that additional surgery was scheduled after the regular hearing was conducted.<sup>9</sup> Accordingly, the Board concludes the issue of ongoing pain treatment should be the subject of an additional hearing upon proper application.

### **AWARD**

**WHEREFORE**, it is the finding of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated March 21, 2005, is affirmed.

**IT IS SO ORDERED.**

Dated this 30th day of September 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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<sup>9</sup> M.H. Trans.

c: Gary M. Peterson, Attorney for Claimant  
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier  
Bryce D. Benedict, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director